TRAILBOSS ENTERPRISES, INC.

CONTRACT NO. V463P-0048-95 **VABCA-5454E & 5471E**

VA MEDICAL CENTER AND REGIONAL OFFICE CENTER
ANCHORAGE, ALASKA

Eric J. Brown, Esq., Jermain, Dunnagan & Owens, Anchorage, Alaska for the Appellant.

Glen E. Woodworth, Esq., Trial Attorney, Anchorage, Alaska; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

Trailboss Enterprises, Inc. (Trailboss or Applicant**)** filed a timely application for $20,397.92 in attorney fees and expenses pursuant to the *Equal Access to Justice Act (EAJA*), 5 U.S.C. 504, incurred in the successful prosecution of its appeals. VABCA Nos. 5454 & 5471, 99-2 BCA ¶ 30,555, recon. den. 1999 WL 820569 (Oct. 14, 1999). Familiarity with the opinions is presumed so that recitation of the facts and the bases of our decisions therein will not be repeated here.

Trailboss's APPLICATION FOR AWARD OF COSTS AND ATTORNEY FEES (APPLICATION) asserts that since the Board granted its appeals in VABCA-5454 and 5471, it was a prevailing party. The Applicant avers that the Government has failed to meet its burden of proving that its position was substantially justified. Applicant's attorney changed law firms during the course of these appeals. Of the total amount sought, $9,238.08 is for attorney fees and expenses

while with Hedland, Brennan, Heideman & Cooke and $11,159.84 while with Jermain, Dunnagan & Owens.

In its OBJECTION TO APPELLANT'S APPLICATION FOR AWARD OF COSTS AND ATTORNEY FEES (OBJECTION), the Government argues that its position was substantially justified and Applicant did not identify with particularity the position of the Government which it asserts was not substantially justified. The Government avers that Applicant failed to file a net worth statement establishing its eligibility for an *EAJA* award. The Government also argues that Applicant is not entitled to any fees or expenses incurred prior to the issuance of the Contracting Officer's final decision.

Applicant filed a REPLY TO THE GOVERNMENT'S OBJECTION that attached an affidavit of Applicant's principal shareholder and founder and a tax return showing that Trailboss employed less than five hundred employees and had less than seven million dollars in total net worth.

DISCUSSION

Timeliness and Itemization of Application

This application is timely and we find it to be sufficiently itemized to support an award of fees and expenses pursuant to *EAJA*.

Size Eligibility For Recovery Of Attorney Fees And Expenses

Based on the Affidavit and tax returns submitted by Trailboss, we find the Applicant eligible to recover attorney fees and other expenses in this application.

Prevailing Party

In order to recover fees and expenses incurred in litigating this appeal, Trailboss must be a "prevailing party" in the litigation. Trailboss totally prevailed in both VABCA-5454 and 5471, obtaining the complete relief it sought. The VA does not contest that Trailboss is a prevailing party. Thus, under the standard established by the Supreme Court in ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983), Trailboss is a prevailing party. ***Warbonnet Electric, Inc.***, VABCA No. 3731E, *et. al.*, 96-2 BCA ¶ 28,480; ***Penn Environmental, Inc.***, VABCA No. 3599E, *et. al.*, 94-1 BCA ¶ 26,326.

Substantial Justification

As the prevailing party in the action, Trailboss may recover its attorney fees and expenses if the Government's position during the course of the actions was not substantially justified. 5 U.S.C. § 504(a)(1). Once an applicant avers in what respect the Government's position in the litigation was not substantially justified, the Government carries the burden of proving that its position was substantially justified in order to avoid the assessment of the applicant's

allowable and reasonable fees and expenses against it. ***Marino Construction Co., Inc.***, VABCA No. 2752E, 92-2 BCA ¶ 25,015. Applicant did not allege particular areas lacking substantial justification in its original application. In its REPLY, Applicant sets forth eleven areas where it claims the VA was not substantially justified.

The VA, citing ***Warwick Holding Co., Inc.***, GSBCA Nos. 8459C(5070), *et. al*. 88-3 BCA ¶ 21,114, argues that, because Trailboss has not identified "with particularity" the position of the Government that was not substantially justified, the Board should look at the totality of the Government's conduct and conclude that the Government's position was substantially justified. The VA points us to the Contracting Officer's decision to withhold the last month's contract payment as meeting the standard that a reasonable man could have reached under the same circumstances. ***Davis v. United States***, 180 Ct. Cl. 20 (1967). VA also argues its good faith efforts to settle the matter and the VA's extending the contract deadlines should be considered. Citing ***Babenco Development Co. Inc. v. United States***, 15 Ct. Cl. 637 (1988), the VA says that the numerous deficiencies in contract performance provide a basis for finding that the Government's assessment of reprocurement costs were substantially justified.

The ***Warwick*** appeal was cited to us in ***Adams Construction Co. Inc.***, VABCA Nos. 4669E & 4900E, 98-1 BCA ¶ 29,479, where we said:

> The import of the VA's argument is left to our speculation in as much as the GSBCA, in the case cited, provides no explanation of the "particularity" requirement and the VA does not explore its parameters. To the extent that the assertion implies that Adams has a burden to prove that the VA's position was not substantially justified or that the VA's burden of proof to establish substantial justification is somehow lessened if an applicant is not particular enough in its allegation concerning substantial justification, it is

> rejected. Adams' assertion in the Application that the VA's positions in both the termination for default and assessment of reprocurement costs were not substantially justified is sufficiently "particular" to meet the threshold requirements of an *EAJA* application. Adams has no burden to prove that the Government's position was not substantially justified; it is only required to make the allegation. ***Marino***, 92-2 BCA ¶ 25,015; ***Siska Construction Company, Inc.***, VABCA No. 3381E, 92-1 BCA ¶ 24,730.

The Government says its settlement attempts are a factor in favor of determining that its position was substantially justified. The VA's proposed modification would have reduced the withheld amount while requiring some punch list items to be performed, at least one of which would be determined the following spring. Since the Applicant totally prevailed, the settlement would have been to the VA's benefit. We fail to see how this impacts favorably on substantial justification. We note that the VA's Rule 4 file contains a request by the Applicant to use Alternative Dispute Resolution (ADR) yet it appears the VA turned down the request. (R4, tab BB).

The VA correctly points out that determining whether it was substantially justified in the positions it took in these appeals is a matter within the discretion of the Board after review of the entirety of the Government's conduct. While the Applicant's contract performance may have given the VA contracting officials cause to take numerous administrative contract actions, they either failed to do so (contract deficiency reports) or the timing and procedure was askew (inspection, termination and reprocurement). Taking into consideration the bizarre and unsupported memos from the first Contracting Officer's Technical Representive (COTR), the "shared services contract", the major discrepancy between the COTR and Contracting Officer about when the inspections were made, and when the Contracting Officer had actual knowledge of the

deficiencies and the failure to properly conduct the "reprocurement", we find the VA's position was not substantially justified. ***Chiu v. United States***, 948 F.2d 711, 715 (Fed. Cir. 1991) citing ***Pierce v. Underwood***, 487 U.S. 552 (1988).

Fees And Expenses

In determining whether certain fees and expenses are recoverable, we follow the applicable statutory provision, which states that the prevailing party in an adversary adjudication shall be awarded "fees and other expenses incurred by that party in connection with that proceeding." 5 U.S.C. § 504(a)(1). Trailboss is an eligible small business presenting a timely and properly itemized application. It is a prevailing party in the litigation and the Government's position was not substantially justified during the action. Consequently, under *EAJA*, Trailboss is entitled to recover its reasonable fees and expenses incurred in the prosecution of the appeals.

Trailboss has applied for the recovery of fees and expenses in the amount of $20,397.92 for these two appeals. Award of fees and expenses where the threshold *EAJA* conditions are met is not automatic upon an applicant surmounting the size, prevailing party, and substantial justification thresholds. The Supreme Court and the Federal Circuit clearly instruct that the amount of fees to be awarded is a matter for the Board's discretion. ***Commissioner, Immigration and Naturalization Service v. Jean,*** 496 U.S. 154 (1990***); Neal & Company v. United States,*** 121 F.3d 683 (Fed. Cir. 1997); ***Chiu***, 948 F.2d 711 (Fed. Cir. 1991).

Expenses (photocopy, telecommunications and postage) of the nature claimed by Trailboss are recoverable under *EAJA*. As documentation for these expenses, Trailboss provided the itemized billings by its law firms. We have

examined the expenses claimed for both firms and find them to be reasonable. ***Penn Environmental Control, Inc.***, VABCA No. 3726E, 94-1 BCA ¶ 26,326.

Applicant requests more than the $125 per hour statutory maximum allowed by 5 U.S.C. §504(b)(1)(A). That section of the *EAJA* states in part, "attorney or agent fees shall not be awarded in excess of $125 per hour unless the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." No such regulation has been promulgated by the VA. Thus, the maximum rate allowed for reimbursement to Applicant is $125 per hour.

Applicant seeks $9,238.08 while Attorney Brown was employed with the Hedland firm. This amount is less than our calculations (63.9 attorney hours at $150 is $9,585 plus expenses of $856.97 for a total of $10,441.97) There is no explanation of why or how Applicant reduced the amount. To adjust the figures to determine the number of hours in order to apply the $125 rate, we remove the expenses of $856.97 from the $9,238.08 leaving a balance of $8,381.11. Dividing the $8,381.11 by 150 results in 55.9 hours for Attorney Brown. We multiply the 55.9 hours by the $125 resulting in $6,987.50 in requested attorney fees.

The Government argues that 27.43 hours of attorney time and $157.42 in expenses be deducted from the Hedland amount because they were performed prior to the final decision. Applicant responds by simply asking us to disregard the argument because the Contracting Officer totally ignored the procedures and protocol relating to the issuance of final decisions. Our review of the Application reveals that Attorney Brown incurred approximately 23.5 hours (the VA appears to have included time indicated as "not charged") and $157.42 in expenses prior to the Contracting Officer's final decision. Fees and expenses incurred prior to

the receipt of the Contracting Officer's final decision are not recoverable. ***Levernier Construction, Inc. v. United States,*** 947 F.2d 497 (Fed.Cir.1991); ***Fletcher & Sons, Inc.***, VABCA No. 3248E, 93-1 BCA ¶ 25,472. As this Board has stated previously: "[t]he efforts of a contractor or its attorney in presenting a claim which ultimately results in any appeal and subsequent litigation before the Board are work performed in connection with routine claims processing, and are not incurred in connection with the adversary adjudication." ***Delfour Inc.***, VABCA Nos. 2049E, *et al.*, 90-3 BCA ¶ 23,066 at 115,813-14 (citations omitted). Based on the foregoing analysis we deduct 23.5 hours from the 55.9 hours of attorney fees and from the expenses of $856.97 we deduct $157.42 for the work performed preceding the final decision, leaving a balance of $4,050 in fees plus $699.55 in expenses for the Hedland firm.

The attorney hours of 71.5 and expenses of $434.84 at the Jermain firm are reasonable. Reducing the attorney fees to $125 results in recoverable attorney fees of $8,937.50 while Attorney Brown was employed with the Jermain firm.

DECISION

For the foregoing reasons, the Applicant, Trailboss Enterprises, Inc., is awarded fees and other expenses under the *EQUAL ACCESS TO JUSTICE ACT* under the Applications in VABCA-5454E & 5471E as follows:

Firm	Attorney fees	Expenses	Total
Hedland,Brennan, Heideman & Cooke	$4,050.00	$699.55	$4,749.55
Jermain, Dunnagan & Owens	$8,937.50	$434.84	$9,372.34
Totals	$12,987.50	$1,134.39	$14,121.89

DATE: **February 28, 2000**

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WILLIAM E. THOMAS, JR.
Administrative Judge
Panel Chairman

We Concur:

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MORRIS PULLARA, JR.
Administrative Judge

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JAMES K. ROBINSON
Administrative Judge